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September 10, 2010

Via Electronic Submission

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

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Re: Notice of Ex Parte Communication

**WT Docket No. 02-55; ET Docket Nos. 00-258, 95-18;
New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SES-T/C-20091211-01575, SES-T/C-20091211-1576, SAT-T/C-0091211-00144.**

Dear Ms. Dortch:

On Friday, September 10, 2010, Lawrence R. Krevor and Trey Hanbury of Sprint Nextel Corporation ("Sprint Nextel"), Marc S. Martin and Thomas F. Cooney of K&L Gates LLP, and Regina M. Keeney of Lawler, Metzger, Keeney & Logan, LLC met with Austin Schlick, General Counsel of the Federal Communications Commission ("Commission"), Sally Stone of the Commission's Office of General Counsel, and Geraldine Matise, Jamison Prime, and Nicholas Oros of the Commission's Office of Engineering & Technology, regarding the above-captioned proceedings. John Culver of K&L Gates LLP participated in the meeting via telephone.

I. The 2005 DBSD Debt Financing Transaction ("2005 Transaction")

Sprint Nextel introduced Thomas F. Cooney, a corporate M&A and securities lawyer and an adjunct professor of business planning at George Washington University Law School for 22 years, who has several decades of experience with debt transactions similar to the 2005 Transaction discussed in a recent *ex parte* submission by ICO Global Communications (Holdings) Limited ("ICO Global").[1] Mr. Cooney had reviewed all of the 2005 Transaction

[1] ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Applications for Transfer of Control, File

documents that ICO Global filed with the Commission late Friday, September 3, 2010, and offered to provide his analysis and answer questions.

Mr. Cooney stated that the 2005 Transaction was not, as a factual or legal matter, a transformative event that affected or restricted ICO Global's controlling role with respect to its subsidiary, New DSBD Satellite Services G.P. (with its affiliates, "DBSD"). Rather, it was a fairly routine and narrowly tailored debt financing with standard covenants to ensure that the proceeds from the loan were used by DBSD, the entity receiving the loan, to carry out the business plan described to the lenders. The 2005 Transaction's covenants and default terms in no relevant way restricted the activities of DBSD's parent, ICO Global, from the way in which they were conducted prior to the financing. To the contrary, the 2005 Transaction documents expressly recognized that ICO Global's control of and direct involvement in DBSD after the transaction would continue.[2]

Mr. Cooney also explained that unless and until the conversion rights held by the lenders are exercised, the lenders have no equity or equity-like rights, and therefore no reason to look at the impact of the 2005 Transaction on a fully-diluted basis. Mr. Cooney went on to note, however, even on a fully-diluted basis, ICO Global would still be in control of DBSD by virtue of its ability to elect a majority of the Board of Directors of DBSD. Indeed, the lenders could have exercised their right to convert their debt interests in DBSD into equity at any time after 2005, but have elected not to, at least until the current bankruptcy proceeding, in which, according to their bankruptcy plan, the lenders contemplate exercising their rights as senior note holders to emerge in control of DBSD.

Thus, given ICO Global's admission of conducting itself together with DBSD as a common enterprise prior to the 2005 Transaction, the absence of anything in the 2005 Transaction that legally curtailed ICO Global's continued control of and involvement in DBSD after 2005, and the facts in the record of ICO Global's direct involvement in DBSD's operations since 2005,[3] Sprint Nextel concluded that ICO Global's "11th hour" declaration

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Nos. SAT-T/C-0091211-00144, *et al.* (Sept. 3, 2010) ("*ICO Global September 3 Notice of Ex Parte Presentation*").

[2] *See id.*, Exhibit C.1 at 59.

[3] *See, e.g.*, Sprint Nextel Written *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SES-T/C-20091211-01575, SES-T/C-20091222-1576, SAT-T/C-0091211-00144 (July 28, 2010), at 3-8 ("*Sprint Nextel July 28 Written Ex Parte Presentation*"); Sprint Nextel Notice of *Ex Parte* Communication, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of

that the 2005 Transaction relieved it of any responsibility under the Commission's BAS reimbursement rules is simply wrong and at best another misguided effort to mislead and distract the Commission.

In fact, Sprint Nextel noted that if the 2005 Transaction had forced ICO Global to become a passive investor in DBSD, as ICO Global asserts, then DBSD should not have filed a *pro forma* transfer of control application for the related transfer of its MSS license and Letter of Authorization assignment to a new special purpose subsidiary as part of the 2005 Transaction[4] – it should have filed a full transfer of control application due to the alleged change in *de facto* control. ICO Global simply cannot have it both ways.

In short, the 2005 Transaction fails to present anything new that substantively affects the public interest rationale for holding ICO Global directly liable for its pro rata share of reimbursing Sprint Nextel's 2 GHz spectrum clearing costs.

II. Clarifications in the Rulemaking

Relying on documents in the record,[5] Sprint Nextel reiterated the importance of the Commission clarifying several issues in the above-captioned rulemaking proceeding. First, on the issue of "band entry," Sprint Nextel requested that the Commission adopt the tentative conclusion that an MSS entrant has entered the band and incurred a cost sharing obligation no later than when it certifies that its satellite is operational for purposes of meeting its operational milestone.

Second, Sprint Nextel asked that the Commission to clarify that once an MSS operator enters the band, the MSS operator's obligation to reimburse the clearing entity for the MSS operator's *pro rata* share of the BAS relocation costs is due, owing and enforceable immediately. Once a later entrant has "entered the band," it should not begin either satellite or terrestrial operations until the party that relocated the BAS incumbents has been fully reimbursed for the later entrant's *pro rata* share of the relocation costs for all BAS markets.

Earth Station Licenses and Authorizations, File Nos. SES-T/C-20091211-01575, SES-T/C-20091222-1576, SAT-T/C-0091211-00144 (Sept. 1, 2010) ("*Sprint Nextel September 1 Notice of Ex Parte Communication*").

[4] *See* ICO Satellite Services G.P., Application for *Pro Forma* Transfer of Control, File No. SAT-T/C-20050906-00174; *see also* ICO Satellite Services G.P., Application for *Pro Forma* Assignment, File No. SAT-ASG-20050927-00185.

[5] *See, e.g.*, Sprint Nextel July 28 Written *Ex Parte* Presentation, at 3-8; Sprint Nextel September 1 Notice of *Ex Parte* Communication.

Third, consistent with the discussion in the *BAS Relocation Report & Order and Further Notice*,[6] Sprint Nextel asked that any BAS expenses accounted for by Sprint Nextel under the general standards and procedures mandated, accepted or otherwise approved under the terms of the 800 MHz Orders, such as an independent accounting of costs performed by a national, third-party accounting firm, should carry a presumption of being valid, qualified, reimbursable expenses, which may be rebutted only on a showing of clear error.[7]

For purposes of clarifying the cost sharing obligations of MSS entrants and operators comprised of multiple related corporate entities, Sprint Nextel respectfully offers a proposed definition for the Commission's rules that accurately captures the integrated nature of these MSS systems and their controlling entities, as follows:

> The cost sharing obligation of an MSS entrant or operator includes not merely the corporate entity holding the Commission license, but all other entities directly involved in, in control of, or otherwise integrated into the operation of the MSS system as a common enterprise. All such entities shall be jointly and severally liable for the reimbursement obligation tied to the spectrum occupied by the MSS system. Entities in the same corporate family as the licensee and providing direct or indirect support to the licensee shall be presumptively viewed as part of that common enterprise.

This definition should ensure that reimbursement obligations are ultimately met regardless of corporate restructurings or targeted bankruptcies.

Finally, Sprint Nextel noted that none of the foregoing interpretations or clarifications would constitute an impermissible retroactive rulemaking.[8] An impermissible retroactive

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[6] *Improving Public Safety Communications in the 800 MHz Band, et al.*, Report and Order and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 7904 (2009) ("*BAS Relocation Report & Order and Further Notice*").

[7] This proposal is consistent with and a logical outgrowth of the Commission's tentative conclusion in the *BAS Relocation Report & Order and Further Notice*, "that, for cost sharing purposes, Sprint Nextel would be required to share with other new entrants information on the relocation costs it has incurred as documented in its annual external audit of 2 GHz band clearing expenses and as provided to the 800 MHz Transition Administrator, as required by the 800 MHz R&O." *Id.* at 7942, ¶ 99. *See also* Reply Comments of Sprint Nextel Corp., *Improving Public Safety Communications in the 800 MHz Band, et al.*, WT Docket No. 02-55, *et al.* (July 24, 2009), at 13-15.

[8] Comments of New DBSD Satellite Services G.P., *Improving Public Safety Communications in the 800 MHz Band, et al.*, WT Docket No. 02-55, *et al.* (July 14, 2009), at 9-13.

rulemaking is one that "alters the *past* legal consequences of past actions."[9] The Commission's clarification of band entry and joint and severally held cost sharing obligations do not alter the underlying cost-sharing obligations of MSS operators, which were set forth in 2004 and predicated on the Commission's long-standing and familiar *Emerging Technologies* doctrine. All MSS band entrants and operators were and remain subject to those cost-sharing obligations, and the Commission's interpretation and clarification in no way establish new obligations or otherwise depart from those prior requirements.

Thus the interpretation and clarification discussed in the meeting and articulated herein would ensure that the Commission's existing BAS retuning reimbursement requirements are properly applied in this proceeding and that the *Emerging Technologies* doctrine is upheld. As the Commission has previously explained,[10] holding that the BAS reimbursement obligations ended on June 26, 2008 would be problematic given the ambiguities in the obligations. An arbitrary cessation of the reimbursement duty as of June 26, 2008 would also be illogical for at least two reasons. First, the BAS relocation efforts experienced unanticipated and unavoidable challenges beyond the individual or collective control of any of the parties to the relocation. Second, the MSS operators experienced unrelated, but similarly unanticipated, delays in constructing, launching and operating their MSS systems, which extended the fulfillment of many of their implementation milestones well past the originally anticipated date for commercial operation of their systems.

While the MSS operators may have believed they were entitled to certain business expectations based on their own prior interpretations of the very ambiguities the Commission now clarifies, those subjective expectations do not amount to a right.[11] It is the Commission's place to interpret and clarify any ambiguities in its own orders, and as the

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[9] *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) (emphasis in original), *cert. denied*, 536 U.S. 923 (2002); *see also Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (exclusivity ban did not alter the *past* legal consequences of *past* actions; the Commission has impaired the future value of past bargains but has not rendered past actions "illegal or otherwise sanctionable") (emphasis added); *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 10-11 (D.C. Cir. 2006) (an agency order that alters the future effect, not the past legal consequences of an action, or that upsets expectations based on prior law, is not retroactive).

[10] *BAS Relocation Report & Order and Further Notice*, 24 FCC Rcd at 7935, ¶¶ 77-78.

[11] *See, e.g.*, *Bergerco Can v. U.S. Treasury Dep't*, 129 F.3d 189, 194 (D.C. Cir. 1997) ("if [an] expectation . . . qualified as a 'right' for purposes of determining impermissible retroactivity, then virtually every licensing applicant would acquire protection from any rule-made variation in licensing standards, *even where the original set of rules was vague* or obviously provisional") (emphasis added).

Commission previously noted, "[n]othing in the text of the relevant orders suggests that the Commission limited the time in which Sprint Nextel could seek reimbursements from MSS entrants *to provide an independent benefit to MSS entrants, e.g., to subsidize them or provide them certainty about their business costs*."[12]

Moreover, even if the MSS entrants' subjective expectations were defensible, the Commission's interpretation would not be impermissibly retroactive if they were to upset those expectations. An agency's actions which affect a regulated entity's expectations or investment made in reliance on the status quo before a rule's promulgation will be upheld if reasonable.[13] Here, the Commission should uphold the *Emerging Technologies* doctrine to promote the public interest in ensuring that entities engaged in band clearance efforts as well as subsequent entrants receive certainty as to their respective duties and obligations. The public interest would not be served by permitting subsequent entrants to avoid reimbursement obligations based on their own subjective reading of ambiguities in Commission orders. Doing so would chill future band clearance efforts, and likely result in underutilization of spectrum as well as increased barriers to innovation and service to the public.

Pursuant to Section 1.1206 of the Commission's Rules, a copy of this letter is being filed electronically in the above-referenced dockets and electronic copies are being submitted to Commission staff listed below. If you have any questions, please feel free to contact me at (202) 778-9859.

Sincerely,

/s/ Marc S. Martin
Marc S. Martin

Counsel for Sprint Nextel Corporation

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12 *BAS Relocation Report & Order and Further Notice*, 24 FCC Rcd at 7935, ¶ 80 (emphasis added).

13 *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (citing *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997)). The Commission is "entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest if it gives a reasoned explanation for the revision." *Id.*

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